

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

ALTANA PHARMA AG and WYETH,
Plaintiffs,
v.
TEVA PHARMACEUTICALS USA,
INC., *et al.*,
Defendants.

C.A. NO. 04-2355 (JLL) (MAH)

Consolidated with C.A. Nos.

05-1966 (JLL) (MAH)

05-3920 (JLL) (MAH)

06-3672 (JLL) (MAH)

08-2877 (JLL) (MAH)

Hon. Jose L. Linares, U.S.D.J.

Hon. Michael A. Hammer, U.S.M.J.

**PLAINTIFFS' OPPOSITION TO SUN'S
REQUEST FOR JUDICIAL NOTICE**

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Plaintiffs submit this opposition to Defendant Sun's Request for Judicial Notice (Dkt. No. 1378), filed yesterday (June 10, 2013). Sun requests that the Court take judicial notice of "(a) the definition of 'authorized generic drug' as defined in 21 U.S.C § 355(t)(3) and (b) the FDA's listing of authorized generics, as mandated by 21 U.S.C. § 355(t)(1), from July 16, 2012 (SUN-DTX 4381)." (Dkt. No. 1378 at 2.) In other words, Sun essentially requests that this Court take judicial notice that Wyeth's OG qualifies as an "authorized generic" under the applicable federal statute.

Sun's Request should be denied because the facts of which Sun requests judicial notice are irrelevant to the issues to be decided at trial. Whether Wyeth's OG happens to meet the definition of an "authorized generic" is not relevant, and Sun has made no effort even to attempt to explain how it might be relevant. Accordingly, putting aside the requirements of Rule 201, the proffered evidence fails to meet the requirements of Rule 402. *See* Fed. R. Evid. 402 ("Irrelevant evidence is not admissible."). *See Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 793 (8th Cir.2012) ("Courts are not required to take judicial notice of irrelevant materials."); *Gisclair v. Galliano Marine Service*, No. 05-5223, 2007 WL 1238902, at *2 (E.D. La. Apr. 25, 2007) ("[I]t is generally agreed that courts may not take judicial notice of irrelevant facts").

Sun's request that the Court take judicial notice of "the definition of 'authorized generic drug' as defined in 21 U.S.C. § 355(t)(3)" should be denied for the additional reason that this federal statute is a legislative fact, not an adjudicative fact, and as such judicial notice is not available under Rule 201. *See* Fed. R. Evid. 201(a) ("This rule governs judicial notice of an adjudicative fact only, not a legislative fact."). *See, e.g., Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312, 322 (1st Cir. 2004) (Lipez, J., concurring) ("Although judicial notice of fact and judicial notice of law share the phrase 'judicial notice,' they draw on different rules of practice. Rule 201 'governs only judicial notice of adjudicative facts.' Judicial notice of law is outside the scope of Rule 201, and derives from practical considerations and case law that do not rely on Rule 201 or principles of evidence." (internal citation omitted)).

For the foregoing reasons, Plaintiffs respectfully request that Sun's Request for Judicial Notice be denied.

Dated: June 11, 2013

Respectfully submitted,

s/ Liza M. Walsh

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